

IN THE MATTER OF THE CLAIM	* BEFORE JOHN T. HENDERSON, JR.,
OF CAROLINE JACKINS,	* ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF	* OAH NO.: DLR-HIC-02-16-10695
GLENN BAILEY, T/A	* MHIC NO.: 16 (90) 644
DBF CONCRETE	*
CONSTRUCTION, INC.	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On February 21, 2015, Caroline Jackins (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for the reimbursement of \$21,288.00 of actual losses allegedly suffered as a result of a home improvement contract with Glenn Bailey, t/a DBF Concrete, Inc. (Respondent).

I held a hearing on September 26, 2016 at the Office of Administrative Hearings (OAH), Hunt Valley. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimant appeared and represented herself. The Respondent appeared and represented himself and his company pursuant to a Special Power of Attorney signed on September 26, 2016, which is a part of the record herein.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 09.08.02; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, how much is the Claimant entitled to receive from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted exhibits on behalf of the Claimant as follows:

- Cl. Ex. 1 - 14: Photographs of property construction
- Cl. Ex. 15: Respondent's proposal to Claimant, dated August 19, 2014
- Cl. Ex. 16: Respondent's second proposal to Claimant, dated October 2014; Claimant's check made payable to the Respondent, dated October 17, 2014, in the sum of \$12,861.80
- Cl. Ex. 17: Project quotation from Patio Enclosures, dated February 20, 2015
- Cl. Ex. 18: Construction work proposal from Area Construction, Inc., dated June 24, 2015
- Cl. Ex. 19: Copies of the following checks: No. 178, dated May 27, 2015, payable to the order of Adkins Contracting Co., in the sum of \$5,000.00 for siding; No. 152,

- Cl. Ex. 20: Contract between Claimant and Luciano Cristofaro Contractors, Inc., dated December 19, 2015
- Cl. Ex. 21: Email from the Respondent to Greg S. Kaski, PE, Structural Engineer, dated May 3, 2016; explanation of photographs one through forty-six
- Cl. Ex. 22: Email from Mr. Kaski to the Respondent, dated July 9, 2015
- Cl. Ex. 23: Letter from the Respondent to the Claimant, dated August 9, 2015
- Cl. Ex. 24: Letter from the Respondent to the Claimant, dated June 30, 2015

The Special Power of Attorney, signed by the Respondent on September 26, 2016, is a part of the record herein.

I also admitted exhibits on behalf of the Respondent as follows:

- Resp. Ex. 1: Internet complaint form, opened April 18, 2016; notice of complaint case resolved, with explanation
- Resp. Ex. 2: Photographs of Claimant's carport, taken on March 4, 2016;
- Resp. Ex. 3: Photographs of Claimant's carport, taken April 19, 2016
- Resp. Ex. 4: Home inspection document, dated April 19, 2016, with an inspection date of May 4, 2016
- Resp. Ex. 5: Building permit for screened porch, dated March 12, 2015

I admitted exhibits on behalf of the Fund as follows:

- GF Ex. 1: Notice of Hearing, dated July 25, 2016
- GF Ex. 2: MHIC Hearing Order, dated March 31, 2016
- GF Ex. 3: Respondent's License History, as of August 9, 2016
- GF Ex. 4: MHIC Home Improvement Claim Form, dated February 21, 2016
- GF Ex. 5: Letter from MHIC to the Respondent, dated March 2, 2016

Testimony

The Claimant testified on her own behalf. She did not call any other witnesses.

The Respondent testified on his own behalf and for his company. He did not call any other witnesses.

The Fund did not present any witness testimony.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC contractor's license number 01-49278 and trading as DBF Concrete Construction, Inc.

2. The Claimant is not related to the Respondent.

3. The Claimant's home is located at 11313 Old Hopkins Road, Clarksville, Maryland 21029 (the Home).

4. The Home is used as the Claimant's primary residence.

5. The Claimant has not filed other claims against the Respondent outside of these proceedings.

6. On August 15, 2014, the Claimant met with the Respondent at the Home, and the Respondent provided an estimate to replace a concrete slab at the front door of the Home, pour a concrete sidewalk and pour a concrete slab in the carport area.

7. On October 17, 2014, the Claimant and Respondent entered into an agreement whereby the Claimant would pay the Respondent \$12,861.80, to do, in summary, the following home improvements:

Remove and pour concrete to replace front stoop, carport floor and back patio
Pour concrete to construct rear walks and rear stoop
Remove bushes, fencing; seal with new poured concrete slab

8. The Claimant disclosed to the Respondent that she intended to have a glass enclosure constructed around the carport floor area.
9. The Respondent advised the Claimant that he would need to construct footers around the carport floor area to ensure the concrete slab would sustain the weight of the glass.
10. The Respondent told the Claimant that the footers would be an additional cost.
11. The Claimant told the Respondent she would not construct a glass porch but would construct a screened porch as she did not want to pay the additional cost for the footers.
12. The parties agreed to the terms of the proposal provided by the Respondent on October 17, 2014.
13. The Respondent constructed the carport concrete slab using extra concrete on the outside borders to support the planned screened walled structure. In addition, he constructed piers on the corners of the slab for posts that would be used to secure the screened walls.
14. The Respondent also affixed rebar¹ to the poured concrete and used a mesh material mixed directly with the concrete within the on-site mixing truck.
15. After the Respondent completed the work, the Claimant paid him \$12,861.80 on October 17, 2014.
16. On February 20, 2015, the Claimant had a glass enclosure constructed around the carport. The enclosure work was done by Patio Enclosure.
17. On March 15, 2015, the Claimant noticed cracks in the concrete slab carport area.
18. The cracks were of a hairline nature. The most prominent crack appeared within the center of the carport concrete slab.

¹ Rebar [(short for reinforcing bar)] is the word used for reinforcing steel bars used on structures made of concrete, brick and other types of materials. The rebar, made of high-carbon steel, protects the structure's materials from weather and extreme temperatures. Rebar often has a ridged surface so that it better adheres to the masonry or concrete. Sometimes it is used in cross patterns for extra support. It can be used as primary or secondary reinforcement or for aesthetic purposes. <http://madisonsteel.com/2014/06/rebar/>

19. In June of 2015, the Claimant telephoned the Respondent to complain about the concrete cracks. The Respondent offered a warranty epoxy fix as a solution, which the Claimant rejected.

20. On June 24, 2015, the Claimant received a proposal from Area Construction, Inc., (Area) who offered to make repairs of the cracks in the concrete for the sum of \$2,994.63.

21. The Claimant did not have Area make repairs.

22. In July 2015, the Respondent returned to the home at the Claimant's request and after viewing the cracks, again advised he would grind the cracks and fill them with epoxy pursuant to the two-year warranty he verbally provided her.

23. The Claimant was not satisfied with an attempt to repair the cracks by filling them with epoxy and declined the offer.

24. The Claimant wanted to demolish the concrete where there were cracks and have the concrete re-poured.

DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available reserve of money from which homeowners could seek relief for actual losses sustained because of an unworkmanlike, inadequate, or incomplete home improvement performed by a licensed home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015). Under this statutory scheme, licensed contractors are assessed fees, which subsidize the Fund. Homeowners who sustain losses by the actions of licensed contractors may seek reimbursement for their "actual losses" from this pool of money, subject to a maximum of the lesser of \$20,000.00 or the amount paid by or on behalf of the claimant to the contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss

that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a). When the Fund reimburses a homeowner as a result of an actual loss caused by a licensed contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she reimburses the Fund in full with annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-411.

Recovery against the Fund is based on “actual loss,” as defined by statute and regulation. “[A]ctual loss means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401. “By employing the word ‘means,’ as opposed to ‘includes,’ the legislature intended to limit the scope of ‘actual loss’ to the items listed in section 8-401.” *Brzowski v. Md. Home Improvement Comm’n*, 114 Md. App. 615, 629 (1997). The Fund may only compensate claimants for actual losses incurred as a result of misconduct by a licensed contractor. COMAR 09.08.03.03B(2). At a hearing on a claim, the Claimant has the burden of proving the validity of the claim by a preponderance of the evidence. Md. Code Ann., State Gov’t §10-217 (2014 & Supp. 2016); COMAR 09.08.03.03A(3). “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep’t.*, 369 Md. 108, 125, n. 16 (2002), *quoting* Maryland Pattern Jury Instructions 1:7 (3rd. ed. 2000).

First, there is no dispute that the Respondent held a valid contractor’s license in 2014 when he entered into the contract with the Claimant. Md. Code Ann., Bus. Reg. § 8-405(a). Second, there is also no dispute that the Claimant is the owner of the home and that there is no procedural impediment barring her from recovering from the Fund. Md. Code Ann., Bus. Reg. §

8-405(a), (f). The next issue is whether the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement due to misconduct, and if so, whether the Respondent made good faith efforts to resolve the claim. A claim may be denied if the Claimant unreasonably rejects good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d).

For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The Respondent's home improvement work was workmanlike, adequate and complete. There is no dispute between the Claimant and the Respondent as to the scope of the work performed pursuant to the October 17, 2014 contract. The Respondent did the work. The Claimant paid him the agreed upon sum of \$12,861.80. The Respondent completed the home improvement work on October 17, 2014.

Five months later, the Claimant noticed hairline cracks in the areas where the Respondent poured concrete. She testified that the most noticeable crack was slightly wider than the width of a hair, longer and more pronounced. The crack was visible within the slab poured as the floor for the enclosed carport. The Respondent testified and agreed that the crack was more than a cosmetic problem. He offered to repair the crack by grinding the area and pouring epoxy into the crack as a sealer. He testified that this type of repair would make the area look better. He offered, in good faith, to do the repair as a warranty service. The Claimant declined the offer, reasonably, because she, in good faith, believed that the cracks in the concrete were unacceptable cosmetically and that it would reduce her property values.

The Claimant presented a proposal from Area who offered to make repairs of the concrete for the sum of \$2,994.63. Area did not provide an opinion as to why the cracks

appeared in the concrete slabs. The Fund recommended that the Claimant be awarded that amount, if I find an actual loss.

The evidence shows that the concrete did crack in various places where it was poured by the Respondent. The Respondent explained that “ice cream melts and concrete cracks;” meaning that ice cream will melt when the conditions allow it, and concrete will crack when the conditions allow it. Cracking of the poured concrete for this home improvement, according to the Respondent, could have been the result of water pressure from the property’s ground water table or from there being too much weight pressure from the glass enclosure constructed by another contractor after the concrete was poured.

According to the Respondent, when the Claimant told him in October 2014 that she intended to construct an enclosure around the carport framed in glass, he advised her that he would need to do additional work to ensure that the weight of the glass would be properly supported by the concrete floor. The additional work included the construction of footers or footings² and underpinning³ at additional cost. The Claimant told the Respondent that she could not afford the extra cost, so the structural accommodations for a glass enclosure were not constructed by the Respondent. Nevertheless, the Claimant did have the glass enclosure constructed on April 19, 2016, but then had it removed and installed a screened enclosure in May 2016.

² The purpose of footers or footings is to support the foundation and prevent settling.
https://www.concretenetwork.com/concrete/footer_fundamentals/

³ Underpinning is used in building construction to support and strengthen a structure, such as a concrete slab.
<http://theconstructor.org/structural-engg/shoring-underpinning-building-construction/323/>.

The crack existed, but there was no competent evidence provided by the Claimant that the crack occurred solely because of any misconduct by the Respondent.⁴ There was no competent evidence provided to show how the Respondent performed the concrete work in an unworkmanlike manner. The Claimant argued that because the cracks appeared after the concrete was poured, it must be the Respondent's performance error that caused the cracks.

The evidence shows that the Claimant did not discover any cracks in the concrete until at least five months after it was poured by the Respondent and after she first constructed a glass enclosure around the concrete floor of the carport without having adequate structural support constructed to bear the weight of the glass, as the Respondent recommended. By a preponderance of the evidence, there was nothing established to show that the Respondent did anything in performing the work to cause any abnormal cracks in the concrete he poured. It was shown that some of the cracks occurred because concrete has a tendency to crack under certain conditions as the Respondent testified. His testimony on the nature of poured concrete and the reasons for cracking were not refuted by the Complainant. The Respondent opined that the more prominent crack on the carport floor probably occurred due to water pressure from either the ground water or there being an inadequate structural support system for the glass enclosure installed on February 20, 2015.

Although the Fund recommended awarding the Claimant the sum proposed by Ace to make repairs, I cannot agree. There was no misconduct by the Respondent in doing the home

⁴ The Claimant secured the services of Greg S. Kaski, P.E., Structural Engineer, to provide an opinion about the cracks in the concrete. Mr. Kaski, by email dated July 9, 2015, advised the Claimant the following:

It sounds like [the Respondent is] willing to help on it then. The cracks on the back slab and the side slab are caused as a result of shrinkage and without rebar present in the slab, . . . will likely increase in size a little over time.

Mr. Kaski did not know if there was rebar present within the concrete poured by the Respondent. The Claimant told him there was not. However, the Respondent testified credibly, that he did use rebar when he poured the concrete on October 17, 2014.

improvement for the Claimant. The Claimant has failed to meet her burden of proof and is not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015) COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:


ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

December 21, 2016
Date Decision Issued

JTH/emh
#165894



John T. Henderson, Jr.
Administrative Law Judge

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PROPOSED ORDER

WHEREFORE, this 15st day of February, 2017, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Sachchida Gupta

***Sachchida Gupta
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION